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No. _____

IN THE
Supreme Court of the United States

IN RE COOPER INDUSTRIES, INC., *Petitioner,*

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals contravene this Court's mandate when, without the benefit of any substantive briefing or argument, it issued a remand order to "permit Aviall Services to amend its complaint…free of any challenge of waiver or forfeiture" despite this Court's express determination that the "preliminary waiver question" should, on remand from this Court, receive "full consideration by the courts below?"

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding whose judgment is the subject of this petition is as follows:

Cooper Industries, Inc.

Aviall Services, Inc.

Hon. Carolyn D. King, Judge
United States Court of Appeals for the Fifth Circuit

Hon. E. Grady Jolly, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Patrick E. Higginbotham, Judge
United States Court of Appeals for the Fifth Circuit

Hon. W. Eugene Davis, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Edith H. Jones, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Jerry E. Smith, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Jacques L. Wiener, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Rhesa H. Barksdale, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Emilio M. Garza, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Harold R. Demoss, Jr., Judge
United States Court of Appeals for the Fifth Circuit

Hon. Fortunato P. Benavides, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Carl E. Stewart, Judge
United States Court of Appeals for the Fifth Circuit

Hon. James L. Dennis, Judge
United States Court of Appeals for the Fifth Circuit

Hon. Edward C. Prado, Judge
United States Court of Appeals for the Fifth Circuit

RULE 29.6 STATEMENT

Petitioner Cooper Industries, Inc. merged into Cooper Industries, LLC, which is a wholly-owned indirect subsidiary of Cooper Industries, Ltd.

Aviall Services, Inc. is a wholly-owned subsidiary of Aviall, Inc.

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IN RE COOPER INDUSTRIES, INC., *Petitioner,*

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

Petitioner Cooper Industries, Inc. respectfully petitions for issuance of a writ of mandamus requiring the Fifth Circuit Court of Appeals to conform its actions to this Court's December 13, 2004 mandate.

OPINIONS BELOW

The remand order of the *en banc* Fifth Circuit at issue here is not reported and appears in the Appendix ("App.") at 35a. This Court's December 13, 2004 opinion and mandate appear at App. 1a.

JURISDICTION

Jurisdiction to issue the requested writ of mandamus directing the conduct of the Fifth Circuit Court of Appeals exists pursuant to 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The statutory basis alleged for the underlying claim with respect to which a waiver question is presented is Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 107(a).

STATEMENT OF THE CASE

In 1997, Aviall Services, Inc. ("Aviall") sued Petitioner Cooper Industries, Inc. ("Cooper") in the United States District Court for the Northern District of Texas seeking environmental costs associated with contamination at four of its properties. App. 5a. Aviall initially brought a claim for direct cost recovery against Cooper under CERCLA Section 107(a), 42 U.S.C. § 9607(a), and for contribution under Section 113(f)(1), 42 U.S.C. § 9613(f)(1). *Id.* Aviall subsequently chose to amend its complaint to delete Count I containing its Section 107(a) cost-recovery claim. *Id.* On Cooper's motion for summary judgment, the District Court determined that Aviall's Section 113(f)(1) contribution claim lacked the necessary legal prerequisites to survive. App. 6a. On August 14, 2001, a divided panel of the Fifth Circuit affirmed. *Aviall Services v. Cooper Industries*, 263 F.3d 134 (5th Cir. 2001). On rehearing, a majority of the Fifth Circuit, sitting *en banc*, reversed, holding that a "PRP may sue at any time for contribution..." under Section 113(f)(1). *Aviall Services v. Cooper*

Industries, 312 F.3d 677, 681 (5th Cir. 2002). This Court granted certiorari, and, following briefing and argument, determined that "Section 113(f)(1) does not authorize Aviall's suit." App. 7a.

In its merits brief to the Court, Aviall urged that, if this Court foreclosed its Section 113(f)(1) claim, it should remand the issue of whether Aviall may seek direct cost recovery under Section 107(a) for further consideration. One of the *amicus* briefs filed in support of Aviall went further, and urged this Court to directly determine whether Aviall was entitled to pursue cost recovery under Section 107(a). The Court's majority addressed this issue expressly:

> Neither the District Court, nor the Fifth Circuit panel, nor the Fifth Circuit sitting en banc considered Aviall's § 107 claim. Aviall included separate § 107 and § 113 claims in its original complaint, but then asserted a "combined" § 107/ § 113 claim in its amended complaint. The District Court took this consolidated claim to mean that Aviall was relying on § 107 "not as an independent cause of action," but only "to the extent necessary to maintain a viable § 113(f)(1) contribution claim." Consequently the court saw no need to address any freestanding § 107 claim. The Fifth Circuit panel likewise concluded that Aviall no longer advanced a standalone § 107 claim. The en banc court found it unnecessary to decide whether Aviall had waived the § 107 claim, because it held that Aviall could rely instead on § 113. Thus, the court did not address the waiver issue, let alone the merits of the § 107 claim.

App. 10a (internal citations omitted).

While declining to address the Section 107(a) issue, the Court's opinion framed two questions for consideration on remand, specifically concluding that "[t]he Section 107 claim *and the preliminary waiver question* merit full consideration by the courts below." App. 11a (emphasis added). Using customary language, it reversed the *en banc* Fifth Circuit's decision and "remand[ed] the case for further proceedings consistent with this opinion." App. 13a.

On January 13, 2005, Aviall moved the Fifth Circuit for permission to brief and present argument directly to the *en banc* court on "whether Aviall may pursue its section 107 claim," so as to have the issue decided in the first instance by the full Fifth Circuit. App. 19a. Cooper opposed this motion, arguing that the "preliminary waiver question," specifically identified by this Court as deserving "full consideration by the courts below," App. 11a, was innately factual and should be remanded to the fact-finding court in the first instance. App. 22a. Cooper further pointed out that Aviall's waiver of any potential direct cost-recovery claim under Section 107(a) is demonstrated in several distinct contexts: "through abandonment of that cause of action in its pleadings, failure to prosecute the claim, direct representations or admissions to the District Court, [and] failure to appeal the District Court's previous determination regarding abandonment of the direct § 107 claim...." App. 23a (footnote omitted).

The Fifth Circuit denied Aviall's motion, and remanded the case to the District Court. However, it did so in a manner that prematurely decided the waiver issue without the aid of briefing or argument, and foreclosed any consideration of it whatsoever by the District Court.

Specifically, the Fifth Circuit's February 15, 2005 remand order provided:

> [T]he case is **REMANDED** to the district court *with instructions* to permit Aviall Services to amend its complaint, if necessary, to assert, *free of any challenge of waiver or forfeiture, whatever statutory claims it urges* in light of the Supreme Court's decision, without prejudice to Cooper Industries' other defenses.

App. 36a (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S ORDER DIRECTLY CONTRADICTS THIS COURT'S MANDATE

This Court's preliminary analysis of any potential rights Aviall might have under Section 107 identified two key issues for further consideration on remand: (1) the "preliminary waiver question" of "whether Aviall has waived this claim" and (2) "the underlying § 107 question (if it is not waived)...." App. 10a-11a. Because these issues were "well beyond the scope of the briefing and, indeed, the question presented" before this Court, App. 10a, the majority declined to resolve either, despite the urgings of the dissent. *Id.* Rather, this Court specified how and by whom these issues should be carefully evaluated and ultimately resolved, ruling that "[t]he § 107 claim and the preliminary waiver question merit *full consideration by the courts below*." App. 11a (emphasis added). This Court then "remand[ed] the case for further proceedings consistent with this opinion." The import of this mandate is clear: the Fifth Circuit and the District Court were to *fully consider* first the "preliminary

waiver question" and then, if necessary, the potential viability of any remaining direct cost-recovery claim under Section 107(a).

The Fifth Circuit's remand order does not adhere to this Court's mandate. Instead, by directing the trial court to permit Aviall to assert, through an amended complaint, a Section 107(a) claim for cost recovery against Cooper, "*free of any challenge of waiver or forfeiture*...," App. 36a (emphasis added), the Fifth Circuit has ensured that the "preliminary waiver issue," which this Court specifically identified as deserving "full consideration by the courts below" (*id.*), will receive no meaningful, substantive consideration whatsoever.

The Fifth Circuit's preemptive remand order was entered without benefit of briefing and argument on the "waiver" issue. Indeed, as this Court recognized, the record before the appeals court, which is entirely devoid of the factual development that this Court's remand order contemplates,[1] is insufficient to resolve the issue.[2] Thus,

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[1] The insufficiency of the factual record before the Fifth Circuit was referenced in Cooper's opposition to Aviall's Motion for Leave to File Supplemental Briefs. *See, e.g.*, App. 27a ("A detailed assessment of this factual issue [of waiver] may necessarily involve fact gathering, including discovery regarding the circumstances surrounding Aviall's change in position and testimony from each person involved.... Following such an inquiry, Judge Fitzwater will be uniquely positioned to decide this factual issue based on his historic personal interaction with counsel, the testimony and demeanor of other witnesses and the nature of the arguments made.").

[2] *See* App. 10a ("Both the question whether Aviall has waived this claim and the underlying § 107 question (if it is not waived) may depend in part on the relationship between §§ 107 and 113. That relationship is a significant issue of its own right. It is also well beyond the scope of briefing....").

while Cooper's "other defenses" were preserved "without prejudice" to asserting them in the District Court, App. 36a, the defenses of "waiver or forfeiture" have been summarily foreclosed on a barren factual record and without "full consideration" of the issue by any court. This Court directed that the "preliminary waiver question" receive far more fulsome consideration by the courts below. A writ of mandamus is required to enforce that mandate.

II. MANDAMUS IS NECESSARY AND PROPER TO RECONCILE THE FIFTH CIRCUIT'S ORDER WITH THE MANDATE OF THIS COURT

This Court has repeatedly recognized that the failure of a lower court to give effect to a Supreme Court mandate creates a proper context for mandamus. *See, e.g., Connor v. Coleman*, 440 U.S. 612, 628-29 (1979) ("When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court...by writ of mandamus. It is well understood that this court has power to do all that is necessary to give effect to its judgments.") (*citing Baltimore & O. R. Co. v. United States*, 279 U.S. 781, 786 (1929)); *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (if a lower court "mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled...by a writ of mandamus to execute the mandate of this Court") (*citing Vetterli v. United States Dist. Court for Cent. Dist.*, 435 U.S. 1304 (1978) and *quoting In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).[3] Thus the use of mandamus here,

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[3] *See also Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 429 (1978); *Bucolo v. Adkins*, 424 U.S. 641, 643-644 (1976); *United States v. Haley*, 371 U.S. 18, 19 (1962); *Deen v. Hickman*, 358 U.S. 57 (1958); *City Bank v. Hunter*, 152 U.S. 512, 514-515 (1894); *In re Washington & Georgetown Railroad*, 140 U.S. 91, 95-96 (1891); *United States v.*

where the Fifth Circuit has strayed far from the path set for it, is well supported.

Exercise of this Court's mandamus power is also fully consistent with the parameters of S. Ct. Rule 20.1. There can be nothing more directly necessary to "aid...the Court's appellate jurisdiction" than ensuring that its mandates are duly regarded and properly construed. In the words of this Court, "issuance of mandamus requiring the lower court to enforce the judgment of the appellate court" is needed to "protect[] the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review...." *United States v. United States Dist. Ct. for the Southern Dist. of N.Y.*, 334 U.S. 258, 263 (1948) (internal citations omitted). Thus, appellate remand orders that, as here, operate to impede or prevent compliance with a Supreme Court mandate pose precisely the type of exceptional circumstance that justifies mandamus. *See id.* at 264 ("It is, indeed, a high function of mandamus to keep a lower court tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court.") (citing *Delaware, L & W R. Co. v. Rellstab*, 276 U.S. 1, 5 (1928)).

III. COOPER HAS NO OTHER MEANS OF ADEQUATE RELIEF

Without this Court's intervention, this eight-year-old case will begin anew before the District Court with the filing of a new complaint containing "whatever statutory claims" Aviall decides to assert. Cooper will have been stripped of all ability to make a factual showing and legal argument of

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Fossatt, 62 U.S. 445, 446 (syllabus) (1859); and *Perkins v. Fourniquet*, 55 U.S. 328, 330 (1853).

waiver.[4] Cooper's only conceivable recourse would be to fully litigate Aviall's new complaint, appeal the inability to argue waiver to the Fifth Circuit, and then finally petition this Court for certiorari regarding the availability of the defense of waiver. This is not an "adequate means of relief." Rather, litigants who have "obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Felter*, 436 U.S. at 497.

This Court unequivocally ordered the courts below to give "full consideration" to "the question whether Aviall has waived [a free-standing Section 107(a)] claim." App. 10a. The Fifth Circuit was thus obliged to carry this clear mandate to execution. It was not at liberty to "vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error...or intermeddle with it further than to settle so much as has been remanded." *In re Potts*, 166 U.S. 263, 265 (1897). Nonetheless, the Fifth Circuit summarily ordered that Aviall be permitted to pursue a Section 107(a) claim on remand to the trial court "free of any challenge of waiver or forfeiture." App. 36a. Because this directive squarely contradicts this Court's remand order instructing "full consideration by the courts below" of the waiver issue, the requested writ of mandamus is required.

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[4] As previously explained, Cooper maintains that Aviall has waived its claim in three ways: (1) by amendment of its complaint to drop its Section 107 cost-recovery claim, (2) through confirmation of this waiver as conceded to the District Court during oral argument, and (3) by failure to raise the issue on appeal. *See* App. 22a – 29a generally.

CONCLUSION

Cooper Industries, Inc. respectfully requests the issuance of a writ of mandamus to the United States Court of Appeals for the Fifth Circuit directing that its remand of this case to the District Court for the Northern District of Texas allow "full consideration" by the trial court of: (1) whether Aviall Services, Inc. has waived its right to assert a direct cost-recovery claim under Section 107(a) of CERCLA, as well as (2) whether, if no waiver is found, Aviall may otherwise pursue such a claim under Section 107(a) of CERCLA.

Respectfully submitted,

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